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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 389

STATE OF FLORIDA, ON RELATION OF HICKS-KESSLER FLYING SCHOOL, INCORPORATED, A FOREIGN CORPORATION, *Petitioner,*

vs.

GEORGE E. HOLT, AS JUDGE OF THE CIRCUIT COURT, IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinions Below

The Order of the Supreme Court of Florida denying the Suggestion for Issuance of Writ of Prohibition entered on August 21, 1951 (R. 31), and the Order denying rehearing, entered on September 5, 1951 (R. 35) were upon unreported memoranda.

Jurisdiction

The Order of the Supreme Court of Florida denying the Suggestion for Issuance of Writ of Prohibition was filed on August 21, 1951 (R. 31). A Petition for Rehearing was denied on September 5, 1951 (R. 35). The Petition for a Writ of Certiorari was filed on October 20, 1951. The jurisdiction of this Court is attempted to be invoked under 28 U. S. C. Section 1251 (1) and Rule 12 (1), third paragraph.

Question Presented

Should this Court grant a Petition for a Writ of Certiorari from a final Order of a State Supreme Court where: (a) No proper statutory basis for jurisdiction is shown in the Petition; (b) No Federal Question was raised before the State Supreme Court; and (c) No Federal Question was involved in the decision of the State Supreme Court, which Court determined that a non-resident defendant in court before it had entered a general appearance by its actions and pleadings in the State Court, and thereby submitted itself to the jurisdiction of the State Court.

Statement of the Case

This is a Petition for a Writ of Certiorari seeking to have this Court review the Order of the Supreme Court of Florida denying the suggestion for issuance of a Writ of Prohibition filed on behalf of Petitioner (R. 27) because the Supreme Court of Florida was of the view that the Petitioner had submitted itself to the jurisdiction of the trial court, and thereby was precluded from attacking the sufficiency of the process by which it had been brought into court (R. 31). A Petition for Rehearing filed on behalf of the Petitioner (R. 33) was also denied (R. 35).

The statement of the case filed by Petitioner is substanti-

ally correct and is accepted by the Respondent, subject to the following statements which are necessary to correct certain inaccuracies and omissions therein.

The Complaint (R. 1) filed on behalf of the Plaintiff in the trial court below invoked the doctrine of *Respondeat Superior* in addition to the licensed dangerous instrumentality rule as a basis for asserting liability against the Petitioner (one of several Defendants in the trial court below).

After the Federal District Judge determined that the case had been improperly removed to the Federal Court, and remanded it to the State Court (R. 22), the Clerk of the Federal Court certified the pending "Motion to Dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue and of lack of jurisdiction, under Rule 12 (b)" (R. 23) to the State Court. This Motion was then brought on for hearing in the State Court, at which hearing the Petitioner appeared and argued through its counsel, and after argument of counsel the trial judge denied the Motion and ordered the Petitioner to file its Answer within thirty (30) days. (R. 26)

The Petitioner then filed its Suggestion for Issuance of Writ of Prohibition (R. 27) as an original action in the Supreme Court of Florida, with the result indicated in the first paragraph above.

ARGUMENT

No Proper Statutory Basis for Jurisdiction Is Shown

The jurisdiction of this Court has not been properly invoked, as Petitioner is seeking a Writ of Certiorari under 28 U. S. C., Section 1251 (1), which deals solely and exclusively with the original and exclusive jurisdiction of this Court, and has nothing whatsoever to do with a Petition for a Writ of Certiorari. Nor is this a case where this Court

would have original jurisdiction under this Section, for it is clearly not an action or proceeding by a State against a citizen of another State. Under the law of the State of Florida, the State is not even a necessary party in a proceeding in prohibition brought in the State Court. *Frederick* v. *Rowe*, 105 Fla. 193, 140 So. 915 (1932); *Cherry* v. *Heffernan*, 132 Fla. 386, 182 So. 427 (1938), and even if it were, the suit would be one by a State against one of its own public officials and residents, and this Court would have no original jurisdiction in such a case. *Georgia* v. *Penn. R. R. Co.* 324 U. S. 439, 89 L. Ed. 1051, 65 S. C. 716 (1945). Nor has the Petitioner attempted to institute an original action in this Court, for it seeks a Writ of Certiorari according to its Petition. Having failed to show any authority for this Court to assume jurisdiction in this cause, it is respectfully submitted that the Petition should be dismissed.

No Federal Question Raised in State Court

This is a Petition for a Writ of Certiorari to have reviewed the denial of Petitioner-Relator's Suggestion for Issuance of Writ of Prohibition (R. 31). While Petitioner-Relator filed a Petition for Rehearing which was denied (R. 35), and the Petitioner has stated that it seeks Certiorari to review the Order of the said Court denying the rehearing, no error in that regard is specified as an error to be relied on in the specification of errors in the Petition before this Court. It is well settled that this Court will not grant Certiorari to review the decision of a State Court unless a Federal Question was raised in the lower court and was involved in its decision. *Connecticut Ex Rel. New York and N. E. R. Co.* v. *Woodruff*, 153 U. S. 689, 38 L. Ed. 869, 14 S. C. 976 (1894); *Boughton* v. *Exchange Bank*, 104 U. S. 427, 26 L. Ed. 765 (1881); *French* v. *Hopkins*, 124 U. S. 524, 31 L. Ed. 536, 8 S. C. 589 (1887).

The Suggestion for Issuance of Writ of Prohibition (R. 27) which was an original action before the Supreme Court of Florida and the denial of which is here sought to be reviewed, did not raise any Federal Question. It did not set up or claim any title, right, privilege or immunity under the Constitution, Treaties or Statutes of, or commission held or authority exercised under, the United States. With respect to its rights the Petitioner-Relator said in its Suggestion:

> "Your petitioner alleges that the purported service of process upon this petitioner as a non-resident corporation, was without sanction or authority of law, and that the respondent was without jurisdiction to enter said order denying of the motion of this petitioner, to quash said service of process, which was patently invalid under the Laws of the State of Florida, and conferred no jurisdiction upon the court or this respondent. In assuming and entertaining jurisdiction of this cause against this petitioner-defendant, respondent Judge of the Circuit Court in and for Dade County, Florida, exceeded the jurisdictional power granted to him as Judge of said Court, under the Constitution and the Laws of the State of Florida." (R. 29)

Though Petitioner is urging in its Petition here that it was denied due process of law under the *Federal* Constitution, no such claim was raised in the State Court, and it is precluded from raising it first in its Petition to this Court.

Although no error is alleged in the denial of the Petition for Rehearing by the Supreme Court of Florida in the specification of errors to be urged in the Petition presented here, even if it were also alleged as error, the result would be the same. Petitioner here complains that the State Supreme Court denied it due process of law under the Federal Constitution in determining that Petitioner entered a general appearance in the trial court. No such claim was

made in its Petition for Rehearing (R. 33). The only mention of the Due Process Clause of the Federal Constitution in the Petition for Rehearing is found in Paragraph 4 (R. 34), where the Petitioner asserted that the purported service of process was contrary to the Federal Due Process Clause.

As Petitioner admits in Paragraph 7 on Page 11 of its Brief, the Supreme Court of Florida never did determine the question of the validity of the service of process, for it found the Petitioner to have submitted to the jurisdiction by making a general appearance in the trial court, which gave the trial court jurisdiction whether or not the original service of process was valid. Inasmuch as the Petition before this Court does not attempt to set up any Federal Question other than a denial of due process under the Federal Constitution, and since the record clearly shows no such Federal Question was raised before the Supreme Court of Florida, it is respectfully submitted that the Petition should be dismissed.

No Federal Question Involved in the Decision of State Court

It is well established that on a Petition for Certiorari from a final decision of a State Court to this Court, the record must show that the decision of the State Court rested upon the disposition of a Federal Question in order for this Court to review such a decision. *March* v. *Nichols & Co.*, 140 U. S. 344, 35 L. Ed. 413, 11 S. C. 798 (1890), and that questions purely of local practice are not Federal Questions. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. Ed. 1149, 17 S. C. 709 (1897).

What constitutes a general appearance in a State Court as distinguished from a special appearance is a question of local practice, and does not raise a Federal Question of Due Process. *York* v. *Texas*, 137 U. S. 15, 34 L. Ed. 604, 11 S. C.

9 (1890); *Western Life Indemnity Company of Illinois* v. *Rupp*, 235 U. S. 261, 59 L. Ed. 220, 35 S. C. 37 (1914); *see Chicago Life Insurance Company* v. *Cherry*, 244 U. S. 25, 61 L. Ed. 966, 37 S. C. 492 (1917).

There is no question here but that the Petitioner was given notice and an opportunity to be heard on the question of jurisdiction, for it has appeared and argued it thoroughly. The fact that the Florida Supreme Court has decided adversely to Petitioner's position furnishes it no magic carpet to review by this Court. What happened to Petitioner was that it forgot that the Federal Rules of Civil Procedure and the Florida Common Law Rules of Practice are not the same, and that while under Federal Rule 12 (b) it would be allowed to contest the jurisdiction and plead to the merits at the same time in the Federal Court, the Florida Common Law Rules are to the contrary in regulating practice in the State Courts. The applicable Florida Common Law Rule is Rule 13 (b) which is set forth in the *Appendix* to the Petition. That Rule does not allow a movant to combine his defenses to the jurisdiction, with his defenses to the merits without submitting himself to the jurisdiction of the Court. The Florida Supreme Court did not hold that the filing of a Petition for removal to the Federal Court constituted a general appearance as Petitioner would have this Court believe. The Florida Supreme Court held that when the Petitioner adopted, argued, and secured a ruling in the State Court after remand, on its Motion to Dismiss presenting the defenses of failure to state a claim on which relief could be granted, together with defenses to the jurisdiction, that the Petitioner under the provisions of Rule 13 (b) submitted itself to the general jurisdiction of the State Court.

As indicated in the *York* v. *Texas* case, *supra*, the Petitioner did not have to come into the Florida Court at all if it did not consider itself under the jurisdiction of the

Florida Court. It could have waited and resisted the attempt to collect any judgment against it as a result of the action, on the ground that the judgment was entered without any jurisdiction. Having determined to enter the Florida Court to have the question of jurisdiction determined, however, it did so subject to the Rules of Practice of the Florida Court, and under those rules it has submitted itself to a general appearance according to the decision of the Florida Supreme Court.

At Page 12 of the Petition, the Petitioner states that the case of *Cherry* v. *Heffernan, supra,* is authority for the proposition that, in Florida, the appearance of a non-resident in the Supreme Court with a Petition for Prohibition will be held a general appearance, and submission to the jurisdiction, even if the service of process has not been sufficient, and we agree that it is authority to that effect. This but adds another string to our bow, for it furnishes another ground for the decision of the Florida Supreme Court which clearly does not raise a question of Federal Due Process under the case of *York* v. *Texas, supra,* and the cases which have followed it.

Petitioner also admits in its Petition, at Page 3, that the only final judgment from which review by certiorari might properly be sought in this case, is the Order denying the Suggestion for Issuance of Writ of Prohibition, and with this we agree, though it appears that the case of *Michigan Central Railroad Company* v. *Mix,* 278 U. S. 492, 73 L. Ed. 470, 49 S. C. 207 (1929) is better authority for the proposition than the cases cited by Petitioner. The Petitioner further admits that the primary litigation has not ended. This is also true, and for that reason it is respectfully submitted that any Orders of the Circuit Judge of the Circuit Court of Dade County, Florida, where this case is now pending, are not properly before this Court on Petition for

Writ of Certiorari and should not be considered by this Court.

No Question Concerning Service or Process Is Before the Court

The Respondent does not propose to burden the Court with argument concerning the construction of the Florida Statute under which the Petitioner was served with process. The Supreme Court of Florida specifically refused to decide that question in its Order and the Petitioner admits that fact on Page 11 of the Petition. That question is obviously not before this Court at this time, and this Court has no way of ascertaining how the Florida Supreme Court will construe the Statute with respect to the owners of aircraft when it is squarely confronted with that problem for decision. At this time the question is moot.

Conclusion

The Petitioner has failed to cite any statutory authority which can be the basis for this Court to assume jurisdiction in this case, and therefore the Petition is insufficient on its face, and should be dismissed. The Petitioner failed to raise any Federal Question before the Supreme Court of Florida, and no Federal Question was involved in the decision of the Florida Supreme Court in denying the Writ of Prohibition, since the question of what constitutes a general appearance as distinguished from a special appearance in a State Court, is a question of local law to be decided by the State Court, and does not raise a question of Federal Due Process. The Petitioner had notice and an opportunity to be heard on the question of jurisdiction in the State Court, and has litigated that question thoroughly in the State Court.

The Petition, on its face, plainly indicates that it is

frivolous and sham, and that it has been interposed solely for delay and to harass the plaintiff widow in the trial court by additional delay and expense which it knows she can ill afford.

We respectfully request the Court to dismiss or to deny the Petition, and to award to the Respondent such costs and fees as the Court may determine he is entitled to receive.

Respectfully submitted.

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